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No. 82-328

In the Supreme Court of the United States

OCTOBER TERM, 1982

BORDEN, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION SUGGESTING MOOTNESS

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The Solicitor General, on behalf of the Federal Trade Commission, suggests that this case has become moot because it has been settled, and that in the circumstances, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to that court with instructions that it remand the case to the Commission for entry of the modified cease-and-desist order to which the parties have agreed.

STATEMENT

1. In this case the Federal Trade Commission found that petitioner Borden, Inc., violated Section 2 of the Sherman Act, 15 U.S.C. 2, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by monopolizing the market for processed lemon juice in the United States (Pet. App. 42a n.4). The court of appeals affirmed (*id.* at 1a-32a).

The Administrative Law Judge ("ALJ") found (Pet. App. 94a-198a): (1) that petitioner possessed monopoly power in the national market for processed lemon juice; and (2) that petitioner had intentionally used this power to repulse competitive initiatives by new entrants through selective geographic price discrimination and promotions that produced unreasonably low prices in contested areas. He expressly found, however, that petitioner had always priced above its own average variable costs (*id.* at 166a-176a).

The Commission unanimously adopted the ALJ's findings concerning the product and geographic markets and Borden's monopoly power in them (Pet. App. 42a-53a, 74a-78a). Basing their decision solely on Section 2 of the Sherman Act (*id.* at 42a n.4), all five Commissioners agreed that Borden had violated that statute, and thus Section 5 of the Federal Trade Commission Act, by using its monopoly power to restrain competition (Pet. App. 39a-93a).[1]

The Commission found that Borden's power was traceable directly to the ReaLemon trademark (Pet. App. 65a):

> In order to preserve its market dominance it manipulated the price premium which that trademark afforded, and engaged in price discrimination. ReaLemon's juice was indistinguishable in its characteristics from competing processed lemon juices; only the market power inherent in the ReaLemon trademark enabled Borden to manipulate price differentials and discriminate among customers in different areas to maximize its advantage over other producers.

Although it concluded that while an image advantage permitting the maintenance of a price premium is like a unit cost advantage, the Commission condemned Borden's pricing practices because temporary price cut-

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[1] Two members, concurred separately (see note 4, *infra*).

ting that excludes "'producers handicapped only by an inferior brand image is socially undesirable'" (Pet. App. 65a).[2]

The Commission noted also that certain commentators condemn as predatory only sales below average *variable* cost, while others also disapprove of sales below average *total* cost, with the intent to exclude an equally efficient competitor.[3] It ruled that while the record did not show "ReaLemon was sold below average *variable* cost, at least not as a consistent course of conduct, it does appear that Borden sold below average *total* cost, when fixed costs are added in" (Pet. App. 61a (emphasis added)). The Commission then held (*id.* at 65a-66a (footnotes omitted)):

> [W]hether or not Borden sold below short-run marginal cost, it is incontrovertible that its pricing practices, including geographic discrimination which was not cost-justified and pricing very close to average variable cost, were exclusionary in intent and effect. To the extent that Borden priced below average total cost with the evident intent to exclude Golden Crown, its practices run afoul of Posner's rule [see note 3, *supra*]. In any event, the effect of Borden's spurious product differentiation, making it necessary for competitors to sell considerably below ReaLemon, created a circumstance where even prices above marginal cost could, as

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[2] The Commission was quoting from Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869, 889 (1976).

[3] The Commission observed that "[v]ariable costs are costs which vary as output varies, as distinguished from fixed costs, which remain constant at differing levels of output" (Pet. App. 60a n.30). The "average variable cost" test for predatory pricing is proposed in 3 P. Areeda & D. Turner, *Antitrust Law* § 715d (1978). The "average total cost/intent to exclude" test is proposed in R. Posner, *Antitrust Law: An Economic Perspective* 188-193 (1976).

> the record indicates [Pet. App. 176a-178a,] be predatory in the sense that even equally efficient competitors could be driven from the market.

The Commission's final order (Pet. App. 93a) provided that whenever the effect would be to "hinder, restrain or eliminate competition" between Borden and its competitors in the sale of processed lemon juice, Borden was prohibited from discriminating in price to any customer without cost justification, selling ReaLemon below its cost or at unreasonably low prices, or granting promotional allowances or payments for promotional services. The Commission explained that "[w]hether a price is 'unreasonably low' must be determined by reference to Borden's own costs, its awareness of its competitors' costs, historic price differentials, and competitive conditions in the market" (Pet. App. 68a n.41).[4]

2. On petition for review, a divided court of appeals affirmed and enforced the Commission's order (Pet. App. 1a-32a). It held that substantial evidence supported the Commission's findings (*id.* at 12a-22a). Moreover, the court ruled that, like the Commission, it need

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[4] Commissioner Clanton's separate concurrence endorsed the majority view that Borden had unlawfully maintained its monopoly power, but he would have based liability exclusively on a finding that in some markets Borden had priced below its average variable costs (Pet. App. 74a-77a). He also would have limited the final order to prohibiting sales below average variable costs (*ibid.*).

Commissioner Pitofsky, also concurring separately, agreed with the majority that Borden's manipulation of its brand-based premium price to drive equally efficient rivals out of the market was a key element in finding monopolization, to the extent that Borden priced below its average total costs. He concluded, however, that little weight should be given to Borden's intent (Pet. App. 78a-93a). He also questioned geographic price discrimination as an independent basis of liability (*ibid.*). Commissioner Clanton shared these reservations (*id.* at 74a).

not choose between the average variable or average total cost tests in order to determine predation (*id.* at 28a). Instead, the court held (*id.* at 29a):

> that when a monopolist, through brand identification or otherwise, can and does manipulate prices in such a way as to exclude equally efficient competitors by requiring them to sell below their average variable costs, such price manipulation is an unreasonable use of power to maintain the monopolist's market position.

Judge Kennedy, dissenting (Pet. App. 33a-38a), concluded that the record contained no proof that Borden had an intent to use its monopoly power in an unreasonably anticompetitive manner, and that its efforts to win market share by advertising, promotional campaigns and price reduction evidenced the normal competitive process. She emphasized that the Commission had not found that Borden used monopoly profits in one market to subsidize losses in others or that its selective price reductions violated the Robinson-Patman Act. Borden's reliance on consumer preference for its trademarked product was also proper. The Commission's decision, in her view, improperly required Borden to establish an above-cost price umbrella to protect competitors.

3. After the petition for a writ of certiorari had been filed, the Commission agreed with Borden to settle the judicial review proceedings. Under the terms of the settlement, the Commission will, upon reacquiring jurisdiction, enter a modified cease-and-desist order.[5]

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[5] The Commission has no jurisdiction to change its prior order so long as the record in the case is before the courts on judicial review. 15 U.S.C. (& Supp. V) 45(b) and (c). Upon the completion of all proceedings on judicial review, including any proceedings on petition for a writ of certiorari in this Court, the Commission will reacquire jurisdiction to alter, modify or set aside its order. 15 U.S.C. 45(g).

On March 3, 1983, the Commission published in the Federal Register a notice inviting public comment on a proposed agreed order in settlement of the proceedings. The proposed order bars Borden, for a period of seven years, from pricing processed lemon juice below Borden's variable costs for the product in any sales district. In addition, the order contains detailed definitions of its terms and a requirement that Borden file annual reports containing information necessary to permit the Commission to monitor compliance (48 Fed. Reg. 9023-9032 (1983), App. A, *infra*, 1a-42a).

The proposed order was accompanied by an explanatory statement to aid public comment (48 Fed. Reg. 9024 (1983), App. A, *infra*, 6a). The statement notes that the Commission had determined to settle the pending litigation because the decision under review did "not set forth a satisfactory, cost-based standard for predation under Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act" (*id.* at 9025, App. A, *infra*, 7a). Continued defense of the decision before this Court would be inconsistent with its present view, which is that the grounds of its decision under review "may discourage dominant firms from vigorously competing" (*id.* at 9025, App. A, *infra*, 8a).

The Commission concluded that its earlier treatment of Borden's trademark was mistakenly based upon a view of "product differentiation as something pernicious in and of itself, which rendered suspect *any* attempt by Borden" to respond to competition by reducing price (48 Fed. Reg. 9025 (1983), App. A, *infra*, 10a). This approach, it concluded, failed to consider "the competitive advantages of Borden's product differentiation, and antitrust law's promotion of interbrand competition" (*id.* at 9026, App. A, *infra*, 11a-12a). The Commission also found its earlier treatment of geographic price discrimination to be unsound because it would improperly require dominant firms to maintain uniform monopoly

prices nationwide in order to protect competitors, a result that it characterized as paradoxical and anticompetitive (*id.* at 9026-9027, App. A, *infra*, 12a-13a). It also found its earlier treatment of Borden's intent to be mistaken. That intent simply reflects a purpose to compete in defense of existing market share. The Commission's earlier finding of predatory intent did not rest upon sub-cost pricing that might be condemned as exclusionary under Section 2 of the Sherman Act, but rather on executive plans that were wholly consistent with zealous competition (48 Fed. Reg. 9026 (1983), App. A, *infra*, 13a-14a). Finally, the Commission determined that its earlier opinion had erroneously invited the court of appeals' holding "condemning price manipulation by a monopolist if such conduct forces its *competitors* to price below *their own* average variable cost" (*id.* at 9026, App. A, *infra*, 15a-17a). It declared that such a pricing umbrella is wholly inconsistent with the concept of price competition the Sherman Act was designed to promote.

For these reasons, the Commission concluded that its earlier opinion had not clarified a proper standard for determining predatory pricing by dominant firms, nor was it consistent with sound antitrust policy under Section 2 of the Sherman Act. The Commission therefore determined tentatively to accept the proposed agreed order, subject to a 30-day comment period. It emphasized, however, that the standard set forth in that proposal would not necessarily be appropriate in any other case, and that the order was being adopted simply as "an appropriate settlement of the pending litigation" (48 Fed. Reg. 9028 (1983), App. A, *infra*, 18a-20a).[6]

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[6] Commissioner Clanton issued a separate statement emphasizing the latter point (48 Fed. Reg. 9028 (1983), App. A, *infra*, 20a-22a).

Commissioner Pertschuk dissented on the grounds that it was improper for the Commission to revise its decisions administra-

Five comments were received in response to the notice. After considering them, the Commission, by minute order of April 21, 1983, voted to accept the settlement, and to ask this Court to grant certiorari, vacate the court of appeals decision, and to direct a remand to the Commission for entry of the agreed order.[7]

DISCUSSION

Petitioner's consent to the entry against it of a modified cease-and-desist order as soon as the Commission reacquires jurisdiction in this case terminates the case or controversy presented by Borden's petition for review in the court of appeals and renders this case moot. *Hammond Clock Co.* v. *Schiff*, 293 U.S. 529 (1934); *J. Aron & Co.* v. *Mississippi Shipping Co.*, 361 U.S. 115 (1959). In the circumstances of this case, the Court should follow the practice used in *J. Aron*, *supra*, by granting the petition for writ of certiorari, vacating the judgment of the court of appeals, and remanding the case to that court with directions for its disposition. Since the Commission has agreed to enter the agreed order when it reacquires jurisdiction, the court of ap-

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tively while they were pending on judicial review; that the earlier decision reflected sound antitrust policy; and that the proposed revised order was deficient in numerous respects (48 Fed. Reg. 9028-9030 (1983), App. A, *infra*, 23a-31a). He subsequently dissented from the request for vacation of the court of appeals' judgment (App. B, *infra*, 43a-44a).

Commissioner Bailey also dissented. She disagreed with the policy analysis in the Commission's statement; found the proposed order to pose numerous practical problems of enforcement; and concluded that the proposed settlement reflected a serious distortion of both the administrative process and the proper relationship between agencies and reviewing courts (48 Fed. Reg. 9030-9032 (1983), App. A, *infra*, 31a-40a).

Commissioner Douglas issued a separate statement concurring in the majority's reasoning and disputing the dissenters' positions (48 Fed. Reg. 9032 (1983), App. A, *infra*, 41a-42a).

[7] Commissioners Bailey and Pertschuk opposed.

peals should be directed to remand the case to the Commission for that purpose. Cf. *Board of Governors of the Federal Reserve System* v. *Security Bancorp*, 454 U.S. 1118 (1981).

The suggested disposition is appropriate in this case. First, it is evident from the statement explaining the Commission's repudiation of the decision affirmed below (see pages 6-7, *supra*) that Borden's petition for a writ of certiorari presents a substantial question of antitrust law: the pricing standards dominant firms may adopt, consistently with Section 2 of the Sherman Act, in competing to defend their share of local markets. Second, if not vacated, the decision of the court of appeals would be likely to spawn legal consequences affecting both the interpretation of Section 2 of the Sherman Act by district courts within the Sixth Circuit, and affecting the litigating posture of petitioner in any future antitrust cases arising out of the pricing conduct the Commission condemned.[8] Third, if the court's decision stands, the Commission's repudiation of the grounds upon which it was founded would produce an unseemly conflict, in the same case, between the decisions of the reviewing court and the agency reviewed. These factors support exercise of this Court's certiorari jurisdiction to vacate the judgment below under the es-

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[8] Under Section 5(a) of the Clayton Act, (Supp. V) 15 U.S.C. 16(a), no collateral estoppel effect may "be given to any finding made by the Federal Trade Commission under the antitrust laws or under [Section 5 of the Federal Trade Commission Act,] which could give rise to a claim for relief under the antitrust laws." This provision, however, does not foreclose claims that the Commission's findings have a prima facie effect under the Clayton Act. Two circuits recognize such an effect. *Purex Corp.* v. *Procter & Gamble Co.*, 453 F.2d 288 (9th Cir. 1971), cert. denied, 405 U.S. 1065 (1972); *Farmington Dowel Products Co.* v. *Forester Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969). See H.R. Rep. No. 96-874, 96th Cong. 2d Sess. 4-5 (1980). The Commission takes no position as to the soundness of these cases.

tablished practice for dealing with cases that become moot while on their way to this Court. *United States* v. *Munsingwear*, 340 U.S. 36 (1950); *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979).[9]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to that court with directions that it be remanded to the Commission for entry of the agreed cease-and-desist order.

Respectfully submitted.

REX E. LEE
Solicitor General

HOWARD E. SHAPIRO
*Acting General Counsel**
Federal Trade Commission

MAY 1983

* The Commission's General Counsel is recused from this case.

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[9] In private litigation, some courts of appeals have said that they need not automatically vacate the judgment below if a case on appeal becomes moot by settlement. Instead, they simply dismiss the appeal. See *Ringsby Truck Lines, Inc.* v. *Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982); *Cover* v. *Schwartz*, 133 F.2d 541, 546-547 (2d Cir. 1942) cert. denied, 319 U.S. 748 (1943). This Court's dispositions of *Hammond Clock* and *J. Aron*, *supra*, indicate, however, that settlement is not invariably a bar to vacation of the judgment below. As shown above, in this case there are substantial reasons why the court of appeals' judgment should be vacated in the public interest.

APPENDIX A

FEDERAL TRADE COMMISSION

16 CFR Part 13

[Docket No. 8978]

BORDEN, INC.; PROPOSED ORDER MODIFICATION WITH STATEMENT TO AID PUBLIC COMMENT

AGENCY: FEDERAL TRADE COMMISSION.

ACTION: PROPOSED AGREED ORDER IN SETTLEMENT OF JUDICIAL REVIEW PROCEEDINGS.

SUMMARY: Ir. settlement of judicial review proceedings resulting from the entry of a Commission cease ad desist order after full adjudicatory proceedings, this agreed modification, accepted subject to final Commission approval, would require a producer of processed lemon juice to refrain, for a period of seven years, from pricing its product below its variable costs for the product in any sales district. "Variable costs" would be defined as all costs which the firm could have chosen not to incur during the relevant time period. The relevant time period would consist of all consecutive fiscal quarters in which the firm's prices failed to cover it total costs, and thus would vary with the duration of any price reduction. The firm would also be required to file annual compliance reports detailing its market share, costs and net revenues. The proposed order would take the place of an order previously entered by the Commission, which was affirmed by a court of appeals in a judgment that is the subject of a pending petition for a writ of certiorari in the Supreme Court. *In the Matter of Borden, Inc.*, 92 F.T.C. 669, 778, 832 (1978) affirmed *Borden, Inc.* v. *FTC*, 674 F.2d 498 (1982), petition for a writ of certiorari filed August 25, 1982, Sup. Ct. No. 82-328.

DATE: Comments must be received on or before April 4, 1983.

ADDRESS: Comments should be directed to: FTC/S, Office of Secretary, Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT: FTC/CD, Barbara A. Clark, Washington, D.C. 20580, (202) 634-4793.

SUPPLEMENTARY INFORMATION: Pursuant to Section 5(c)-(k) of the Federal Trade Commission Act, 38 Stat. 719-721, as amended, 15 U.S.C. 45(c)-(k) and an order of the Commission entered on February 25, 1983 notice is hereby given that the following agreed order to cease and desist, having been accepted by the Commission in settlement of litigation, subject to final approval, has, in the exercise of the Commission's discretion, been placed on the public record for a period of thirty [30] days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(14) of the Commission's Rules of Practice (16 CFR 4.9(b)(14)).

PROPOSED ORDER

The Commission having considered the proposal of Borden, Inc., to terminate the pending processings for judicial review of the order to cease and desist entered herein on November 7, 1978; and the Commission and Borden having agreed upon the provisions of a final order modifying the order of November 7; accordingly,

It is hereby ordered, that the Commission's Order in this matter, dated November 7, 1978, is hereby revised to read as follows:

ORDER

It is ordered, that Respondent, in connection with the production, marketing and sale of processed lemon juice in or affecting commerce, as "commerce" is de-

fined in the Federal Trade Commission act, shall forthwith cease and desist from:

Selling ReaLemon brand reconstituted lemon juice at a price or prices so that Respondent's net revenue during any fiscal quarter for any sales district is below Respondent's variable cost of the product sold in that quarter and sales district.

For purposes of this Order only, the following definitions shall apply:

A. "Total cost" means the sum of all costs properly attributable to sales made by Respondent of ReaLemon brand reconstituted lemon juice during the relevant fiscal quarter in the relevant sales district.

1. "Total cost," and its various elements, shall be calculated in the same manner as reflected in Respondent's accounting records as of January 1, 1983. With respect to elements of cost incurred over geographic markets that do not coincide with Respondent's sales districts, such elements of cost shall, be allocated to a sales district on the basis of unit volume sold during the relevant quarter in the relevant sales district, or on the basis of identifiable factors that make allocation to a particular sales district proper, or on the basis of a combination of these two approaches. Similarly, with respect to allocations of elements of cost which, as of January 1, 1983, were made only annually, such elements of cost shall be apportioned to the relevant quarter on the basis of the unit volume sold during that quarter in the relevant sales district, or on the basis of identifiable factors that make allocation to a particular quarter proper, or on the basis of a combination of the these two approaches. The methods of allocation chosen shall be uniform for all sales districts and for all quarters for which an annual compliance report must be submitted. The methods shall not be changed without prior notice to the Commission.

2. The cost of spot television advertising purchased for a station in a particular sales district shall be allocated to the sales district in which the station is located. The costs of all television advertising other than spot television shall be allocated to the relevant sales district for the relevant time period on the basis of the volume of unit sales in that district.

B. "Variable cost" means the sum of all cost included within total cost which Respondent could have avoided during the relevant time period.

1. A cost, whether an element of cost or a portion of an element of cost, shall be considered as one which Respondent could have avoided if, during any part of the relevant time period, Respondent could have chosen not to incur that cost consistent with prudent business practices, and without violating contractual or other legal commitments.

2. The relevant time period, for any fiscal quarter and sales district in which Respondent's net revenue in that quarter and sales district was below its total cost, shall be the period composed of the quarter and any consecutive preceding quarters in which Respondent's net revenue in that sales district was also below its total cost. The relevant time period for any other fiscal quarter and sales district shall be the period composed of that quarter.

C. "Net revenue" means gross revenue to Respondent resulting from sales of ReaLemon brand reconstituted lemon juice, net of returns and allowances, cash discounts, and trade promotions. "Net revenue" and its various elements shall be calculated in the same manner as reflected in Respondent's accounting records as of January 1, 1983.

D. "Fiscal quarter" means the period which coincides with Respondent's standard accounting quarters.

E. "Sales district" means each of the geographic subdivisions of the country, designated, identified and used

as such by Respondent in its sales and accounting records (currently twenty-two (22)). If the sales district are changed, the Commission will be notified.

F. "Trade promotions" means discounts or other financial incentives to the grocer or wholesaler, such as buying allowances or retailer coupons. "Trade promotions" (regardless of the manner in which that term is used by Borden in its accounting records) shall not be considered as a "cost" and shall be considered a reduction in net revenue.

G. "Unit" means one case of 12 bottles of ReaLemon brand reconstituted lemon juice in the 32 ounce size, or an equivalent volume of ReaLemon brand reconstituted lemon juice bottled in different sizes.

H. "Respondent" means Borden, Inc., its successors and assigns, officers, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, affiliate, division, or other device.

It is further ordered, that this Order shall remain in effect for seven years from the date it becomes final. During that period, Respondent shall file annual compliance reports with the Commission within 60 days of the end of its fiscal year. Each annual report shall include, for each sales district in which Respondent sold ReaLemon brand reconstituted lemon juice: (a) Copies of A.C. Nielson market survey reports, or substantially similar market survey reports, detailing the quarterly and annual market shares of ReaLemon brand reconstituted lemon juice and the quarterly and annual market shares of its branded and private label competitors, (b) an accounting quarterly of its total costs for ReaLemon brand reconstituted lemon juice, and (c) an accounting quarterly of its net revenue from sales of ReaLemon brand reconstituted lemon juice.

Each annual report shall also include, for each sales district and fiscal quarter in which Respondent's net revenue for such sales district and fiscal quarter was

below its total cost, proof that Respondent's net revenue in that district and quarter exceeded Respondent's variable costs of the product sold in that district and quarter.

STATEMENT OF THE COMMISSION ON THE PROPOSED ORDER MODIFICATION IN BORDEN, INC., TO AID PUBLIC COMMENT

The Federal Trade Commission has provisionally determined to accept an agreement from Borden, Inc. to settle the pending proceedings for judicial reveiw of a previous Commission order.

The proposed order modification has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this time will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

In its opinion and final order in this case, the Commission found that Borden, Inc., had violated Section 2 of the Sherman Act, 15 U.S.C. 2, and consequently, Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by monopolizing the market for processed lemon juice in the United States.[1] *In the Matter of Borden, Inc.*, 92 F.T.C. 669, 778, 832 (1978). On respondent's petition for review, the United States Court of Appeals for the Sixth Circuit affirmed and enforced the Commission's order. *Borden, Inc.* v. *FTC*, 674 F.2d 498 (1982). On August 25, 1982, Borden filed a petition for a writ of certiorari in the Supreme Court of the

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[1] The Commission decided this case solely under the standards of monopolization developed under Section 2 of the Sherman Act, as comprehended within Section 5 of the Federal Trade Commission Act. It expressly noted that it did not address other possible grounds for liability under Section 5 of the FTC act. 92 F.T.C. at 781, n.4

United States seeking review of the court of appeals judgment. Sup. Ct. No. 82-328. That petition is still pending. After it was filed, the Commission and respondent undertook negotiations looking to a mutually acceptable disposition of the important questions of competitive policy raised in this matter. That process has culminated in the proposed order attached hereto, which the Commission is contemplating entering as soon as it reacquires jurisdiction over this case.[2] To that end, the Commission is making the text of the proposed order available for public comment for 30 days.[3]

The Commission has determined to settle the pending litigation that resulted from its decision and order of November 7, 1978 because its prior decision herein does not set forth a satisfactory, cost-based standard for predation under Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Continue defense of that decision in the pending proceeding before the Supreme Court would therefore be inconsistent with the Commission's present view of the matter.

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[2] The Commission has no jurisdiction to change its prior order so long as the record in the case is before the courts on judicial review. The Commission's power to modify or set aside its order in whole or in part continues only "until the record in the proceeding has been filed in a court of appeals of the United States," 145 U.S.C. 45(b), (c). Thereafter, the Commission does not reacquire jurisdiction to alter, modify or set aside its order until all proceedings on judicial review are completed, including any proceedings on petition for a writ of certiorari in the Supreme Court, 15 U.S.C. 45(g). The Commission's invitation and consideration of public comment of the proposed settlement is not inconsistent with the court's exclusive jurisdiction because such action affects only the Commission's position in the litigation.

[3] A public comment period is not required by the Commission's rules, as this is neither a consent agreement terminating an administrative complaint pursuant to Rule 3.75 nor a modification of a final order pursuant to Rule 2.51. However, because of the importance of the issues involved in this matter, the Commission has chosen to seek public comment voluntarily.

Since the court of appeals' judgment was based on grounds to which the Commission no longer adheres, the Commission plans to request the Solicitor General to advise the Supreme Court that the petition for a writ of certiorari should be granted, and that the decision of the court of appeals should be vacated with instructions to remand the case to the Commission. Upon remand, the Commission proposes to enter the attached order in settlement of the litigation, and of the Commission's complaint against respondent.

The Commission is of the view that the standard of conduct it applied to Borden's competitive behavior is inconsistent with the purposes of Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act because it may discourage dominant firms from vigorously competing. Subsequent to its ruling in this case, the Commission held in *E.I. du Pont de Nemours & Co.*, 96 F.T.C. 653, 750-751 (1980):

> Antitrust policy wisely disfavors monopoly, but it also seeks to promote vigorous competitive behavior. Indeed, the essence of the competitive process is to induce firms to become more efficient and to pass the benefits of the efficiency along to consumers. That process would be ill-served by using antitrust to block hard, aggressive competition that is solidly based on efficiencies and growth opportunities, even if monopoly is a possible result. Such a view, we believe, is entirely consistent with the "superior skill, foresight and industry" exception in [*United States* v. *Aluminum Company of America*, 148 F.2d (C.A.2 1948)] and subsequently cases, for those decisions clearly indicate that monopoly may be lawfully created by superior competitive ability.

That standard informs the Commission's present view of this case.

A. PRODUCT DIFFERENTIATION

The Commission found that Borden had "manipulated"—*i.e.*, reduced—the premium price that consumer preference had conferred upon its brand, in those areas of the national market in which it faced direct competition. In short, Borden reduced prices in order to defend its market share in response to a competitive challenge. The Commission found Borden's price reductions to be unlawful in part because, in the Commission's view, the ReaLemon trademark and the premium price it commanded reflected a form of "spurious product differentiation." 92 F.T.C. at 805. The Commission believed that processed lemon juices are not substantially different, that (apart from advertising cost advantages) producers of processed lemon juice are equally efficient, and that consumer preferences for the ReaLemon brand constituted a significant barrier to entry protecting Borden's monopoly position. 92 F.T.C. at 800, 695, 721.

The Commission recognizes that brand preferences and advertising costs may affect the costs of entry. The conditions of entry, in turn, are one of several factors that may affect the appropriate standard for determining whether any given price reduction is predatory—although, as we discuss below, experts are far from agreed on the question of what sort of standard to use or how such effects ought to be taken into account. Compare, e.g., P. Joskow & A. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 *Yale L.J.* 213, 249 (1979), with Y. Bronsen, *Concentration and Public Policy* 216-65 (1982). Among the factors that have been suggested as relevant to this inquiry are the extent of any differences between the promotional costs faced by later entrants and those faced by the dominant firm when it originally established its brand (see R. Schmalansee, *Product Differentiation Advantages of Pioneering Brands*, 72 *Am. Econ. Rev.* 349

(1982)); and the extent to which promotional expenditures represent sunk costs which could not be recovered by an unsuccessful entrant (cf. W. Baumol & R. Willing, *Fixed Costs, Sunk Costs, Entry Barriers, and Sustainability of Monopoly*, 96 *Q.J. Econ.* 405, 418-19 (1981).

However, the Commission did not analyze brand preferences and promotional costs as neutral factors affecting the conditions of entry, and thereby affecting the appropriate predation standard.[4] Instead, the Commission apparently viewed product differentiation as something pernicious in and of itself, which rendered suspect any attempt by Borden to respond to Golden Crown's competition by reducing price. In the commission's view, the fact that Borden's price cuts were made from the position of strength reflected by its price premium was itself enough to remove those price cuts from the category of "ordinary marketing methods available to all," and turn them instead into illegal predatory pricing. 92 F.T.C. at 803.

This approach not only unduly limits the ability of an established brand to compete by reducing prices, it also misperceives the nature of product differentiation and of the price premiums reflecting consumer familiarity with or acceptance of an established brand. While such premiums may indeed affect the conditions of entry, they also serve important competitive functions. An integral part of the competitive process—i.e., the process by which consumers select the mix of goods and services they most prefer—is the cost to consumers of becoming informed about a brand's advantages and availability. An established brand is one which has invested capital to reduce those costs, having acquainted most

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[4] Thus, while Commissioner Pitofsky believed that entry conditions justified application of an average total cost rather than an average variable cost standard, he had to concur separately to express that view, 92. FTC. at 817-832.

consumers with the product and its quality. The premium accruing to a brand name is thus a form of good will, whose value can be measured by the strength of consumers' preference for that brand. See, e.g., T. Nagle, *Do Advertising-Profitability Studies Really Show that Advertising Creates a Barrier to Entry?*, 24 *J.L. & Econ.* 333 (1981). Federal statutory policy with respect to trademarks expressly encourages and protects this form of good will. 15 U.S.C. 1167.

In this case, consumers were willing to pay a premium price in reliance upon Borden's familiar and successfully advertised trademark. That willingness reflected a marketplace judgment about interbrand competition, which "is the primary concern of antitrust law." *Continental TV* v. *GTE Sylvania*, 433 U.S. 36, 52, n.14 (1977). From an economic standpoint, cost efficiencies achieved with respect to the image value of a successfully advertised product are in many ways similar to cost efficiencies achieved in any other aspect of its production and distribution. Professor Scherer, in the passage adopted by the Commission (92 F.T.C. at 804), conceded as much.[5]

The Commission's decision did not adequately weigh the competitive advantages of Borden's product differ-

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[5] The Commission had relied upon Profesor Scherer's observation that while an image advantage permitting the maintenance of a price premium is like a unit cost advantage, temporary price cutting that excludes " 'producers handicapped only by an inferior brand image is socially undesirable.' " Scherer, *Predatory Pricing and the Sherman Act:* A Comment, 89 *Harv. L. Rev.* 869, 889 (1976). Professor Scherer's disapproval of image advantage exclusionary pricing, however, did not rest on economic factors. He observed in a sentence omitted from the passage quoted by the Commission that "[a]ssessing the social efficacy of such cases calls for strong non-economic value judgments." *Id.* The Commission agrees with Judge Kennedy's dissent in the court of appeals (674 F. 2d at 519, n.2) that social values unrelated to the protecting of competition are not a concern of tribunals acting under the Sherman Act.

entiation and antitrust law's promotion of interbrand competition. Instead, it assumed that consumer preference for Borden necessarily constituted an *anticompetitive* barrier protecting Borden's monopoly position from erosion by new entrants. Moreover, it therefore barred Borden from reducing its prices in competitive markets until its monopoly position had disappeared, *i.e.*, until enough consumers were buying competing brands to neutralize Borden's brand advantage. 92 F.T.C. 805-809, 832-833. This indefinite restraint on price competition, as Commissioner Clanton observed, "threatens to prolong unduly the interval over which consumers must pay higher prices and during which less efficient firms are sheltered from competition." 92 F.T.C. at 814. Because the Commission's analysis of Borden's brand advantage appears to be inconsistent with the purposes of the antitrust laws to promote vigorous competition, as recognized in its *du Pont* decision, the Commission can no longer defend this aspect of its opinion.

B. GEOGRAPHIC PRICE DIFFERENTIATION

The Commission also considers the treatment of geographic price discrimination in its prior opinion to be unsound. The opinion recognized (92 F.T.C. 804, n.38*) that "price discrimination among different geographic markets does not of itself constitute a violation of Section 2 of the Sherman Act or Section 5 of the FTC Act." The fact that Borden may have charged lower prices than elsewhere to retailers in areas where it faced competition could not produce competitive injury to those retailers, or to Borden's customers located outside those markets, because the former do not compete with the latter. Nor can such price differences have caused any injury to competing producers of lemon juice within those markets, at least absent proof that Borden was subsidizing its losses in competitive markets with its profits in monopoly markets. Although the Commission

stated in its opinion that Borden in part subsidized its price cuts with continued monopoly pricing elsewhere 92 F.T.C. at 802, as Judge Kennedy observed (674 F.2d at 519), the Commission made no specific finding to support its statement; it presumed what had not been proved.

The only effect of Borden's geographic price differences was to confront Borden's competitors with prices lower than Borden charged in markets where they did not compete. Any losses they suffered, therefore, resulted not from "discrimination," but from the absolute level of Borden's prices in the markets where they actually competed. When a dominant firm like Borden, that operates nationally, is threatened with loss of market share by the aggressive price rivalry of competitors, common sense and sound antitrust policy should recognize, as did Commissioners Pitofsky and Clanton, that the firm's local price reductions can be "a wholesome part of the competitive process" (92 F.T.C. at 818-822). Otherwise such firms would be required to maintain uniform monopoly prices nationwide in order to protect competitors, a paradoxical and anticompetitive result. Thus, in the Commission's present view, only if Borden's responsive pricing in locally competitive markets had been below lawfully permissible cost levels, would there have been a basis for finding unlawful monopolization.[6]

C. RESPONDENT'S INTENT

The Commission's opinion condemned Borden's "pricing very close to average variable cost" (92 F.T.C. 804) as "exclusionary in intent and effect" *(id.)* and therefore unlawful because of Borden's monopoly market share. See *United States* v. *Griffith*, 334 U.S. 100,

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[6] The Commission did not, in finding liability, invoke the Robinson-Patman Act or the reasoning of *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967).

107 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809, 811 814 (1946); *United States* v. *Grinnel Corp.*, 384 U.S. 563 (1966). This condemnation, however, is merely a conclusory characterization. Such pricing should be legally "exclusionary" only if it is at sub-cost levels that Section 2 condemns as predatory. Borden's intent to compete in defense of its market share was to be expected, and, not surprisingly, was clearly shown by its marketing plans. In *du Pont*, however, (96 F.T.C. at 727) the Commission held that efforts to win every sale are not enough to evidence an intent to exclude in the sense condemned by *Griffith*, *American Tobacco Co.* and *Grinnel*. The line between "intent to exclude" and "intent to acquire market share" is too attenuated to be reliably drawn solely from documentary evidence of management's state-of-mind. Executives on the front line of the competitive struggle are notoriously prone to overzealous hyperbole, and "[a]fter all, competition consists of winning business from rivals." *MCI Communication Corporation, et al.* v. *American Telephone and Telegraph Company*, 1982-83 Trade Cases ¶ 65, 137 (7th Cir. January 12, 1983), at 71,374. See also Posner, *Antitrust Law: An Economic Perspective*, 189-190 (1976); Areeda, *1982 Supplement to Antitrust Law*. ¶ 714.2c. The proof of Borden's intent reflects these uncertainties. Thus, as Commissioner Clanton and Pitofsky noted (92 F.T.C. at 814, 818), it is actual pricing behavior, rather than executive plans, that constitute the best evidence as to whether or not Borden had an intent to exclude. Judge Kennedy was correct, therefore when she observed: "Borden surely meant to obtain as much of the reconstituted lemon juice market as it could, but that is the very essence of normal competition, a goal that we approve even for a monopolist" (Pet. App 35a). As noted in the *du Pont* case, *supra*, this is a view now shared by the Commission.

D. COMPARISON WITH RIVAL'S COSTS

The court of appeals read the Commission's opinion as condemning price manipulation by a monopolist if such conduct forces its *competitors* to price below *their own* average variable cost. 674 F.2d at 515-516. This interpretation cannot be squared with the competitive process protected by the Sherman Act. That statute protects price competition because it is "the central nervous system of the economy." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). In effect, the court of appeals rule would require dominant firms to raise a price umbrella over competitors by maintaining minimum prices set with reference to their competitors' costs rather than their own.

Such a rule would turn the competitive process upside down by requiring dominant firms to maintain prices at monopoly levels, and by depriving consumers of the benefits of price competition. Price competition induces firms to maximum their profits by achieving cost efficiencies in production, marketing (including advertising), and distribution. Lower costs enable them to price at levels which will capture marekt share from their rivals. If firms must price with reference to their rivals' costs, the entire mechanism by which competitive pricing produces cost efficiency is destroyed. The reasons are explained in Commissioner Pitofsky's concurring opinion (92 F.T.C. at 821):

> A rule that prevents a monopolist from cutting price in response to new or augmented competition requires the monopolist to wait passively as small, perhaps less efficient arrivals take business away. During this time, consumers who continue to buy from the monopolist are paying higher prices because the law prevents the monopolist from pursuing its own best business interest by instituting price reductions that may be possible due to its efficiency. New entrants protected by a legally man-

> dated umbrella price may themselves charge higher prices than would otherwise be the case—sufficiently below the monopolist price to take some of its business but sufficiently high to make supra-competitive profits themselves. Pursuing this scenario, the whole industry may become economically inefficient for the period of time the administered price umbrella is in effect. Finally, a legally mandated umbrella price generates extremely burdensome administrative problems in supervising the monopolist's prices policies.

The court of appeals' approval of umbrella pricing is directly attributable to the ambiguities in the Commission's opinion. The Commission expressly stated that "the ALJ did not find that 'ReaLemon' was sold below cost, nor do we * * *" (92 F.T.C. at 804).[7] On the other hand, the Commission also stated that "while it does not appear that ReaLemon was sold below average variable cost, at least not as a consistent course of conduct, it does appear that Borden sold below average total cost, when fixed costs are added in" (92 F.T.C. at 807). The Commission then indicated that to the extent Borden priced below average total cost, it violated the rule against this practice proposed by Professor Posner[8] (92 F.T.C. at 804, 805). But it never expressly adopted this rule as a basis of decision. As the court of appeals correctly observed (678 F.2d at 515), the Commission made no choice between average variable and average total cost rules. Instead, it based its decision on a determination that "in any event, the effect of Borden's spurious product differentiation, making it necessary for competitors to sell considerably below ReaLemon, created a circumstance where even prices

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[7] The Commission apparently was referring to the absence of pricing below average variable cost. It agreed with the ALJ's findings in this respect (92 F.T.C. 753-754, and 800).

[8] R. Posner, Antitrust Law: An Economic Perspective 168-193 (1976).

above marginal cost could, as the record indicates (I.D. 194-200), be predatory in the sense that even equally efficient competitors could be driven from the market." 92 F.T.C. at 805. Thus, the Commission's holding did not at all rest on a pricing standard based on the seller's costs, but instead, on the costs of the seller's competitors. The Commission's holding invited the umbrella pricing rule, based on "manipulation" of Borden's premium price, that was adopted by the court of appeals. 674 F.2d 515-516.

In a subsequent decision, another panel of the Sixth Circuit, distinguishing the Borden case, has stated that "Borden was found to be predatorially pricing by setting its prices below average total cost." *Richter Concrete Corp. et al.* v. *Hilltop Concrete Corp., et al.*, 1982-83 Trade Cas. ¶ 65,003, at 70,591, n.6 (1982). The *Richter* panel, however, was of the view that mere proof of pricing below average total cost is insufficient to support an inference of predatory pricing. Instead, it read the *Borden* decision as condemning Borden's below cost pricing because of presence of other factors as well: Borden's geographic price discrimination; its 90% market share; the high entry barrier due to consumer preference to ReaLemon; and Borden's subjective intent to eliminate competition. *Id.* As we have shown above, however, the Commission's discussion of these additional factors, either jointly or severally, did not necessarily establish a predatory intent to foreclose competition within the meaning of Section 2. Thus, insofar as the court's affirmance of the Commission's decision might be read as resting upon Borden's pricing below average total cost, the Commission's prior opinion failed to set forth a reasoned explanation of why such pricing is improper.[9]

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[9] We note also that the Sixth Circuit's subsequent explanation of *Borden* in *Richter* appears to be more consistent with Commissioner Pitofsky's concurring opinion, than with the Commis-

E. CONCLUSION

The proper standard for determining predatory pricing continues to be a subject of debate among economists and in the courts. See J. Brodley & G. Hay, *Predatory Pricing: Competing Economic Theories in the Evolution of Legal Standards*, 66 Cornell L. Rev. 738, 740 (1981). The courts that have considered the matter have looked to some measure of marginal or incremental costs because "when a price floor is set substantially *above* marginal or incremental costs, a price umbrella is created which allows less efficient rivals to remain in the market sheltered from full price competition." *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, *supra*, at 71,378 (*emphasis in original*). *Accord*, *Northeastern Telephone Co.* v. *AT&T*, 651 F.2d 76, 87-90. Most courts have used average variable cost as a factor against which to test an alleged predator's pricing levels, but almost always have expressed a willingness to consider other factors. *MCI Communications Corp.*, *supra*, at 71,379-71,382. See *e.g.*, *Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980). Some movement away from emphasis on short-run marginal costs has now appeared in the decisions. E.g., *MCI Communications Inc.* v. *American Telephone & Telegraph Co.*, *supra*; *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 58 (1982). See Note, *Predatory Pricing: The Retreat from the AVC rule and the Search for a Practical Alternative*, *22 B.C.L. Rev.* 467 (1981). Because all incremental costs vary in the long run, the debate has increasingly focused on what costs are to be

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sion's ruling. The Commission expressed no agreement with Commissioner Pitofsky's proposal that the average total cost test be adopted as the rule of decision in this case. His concurrence was apparently necessary because the majority was not adopting such a test.

attributed to a particular operation, and over what period of time. There has been a deep concern for the goal of developing practically administrable standards that can be used by courts, counsel and businessmen. See *Areeda, 1982 Supplement to Antitrust Law*, ¶¶ 710'-721'.

For the reasons given above, the Commission's discussion of these issues in its earlier opinion has not clarified them; nor has it articulated reasons consistent with sound antitrust policy for finding Borden liable for monopolization under Section 2 of the Sherman Act. The Commission therefore believes that the public interest would not be served by defending its earlier opinion in the Supreme Court. Instead, the Commission has provisionally agreed to a settlement of the litigation, and proposes to modify the order to prohibit Borden from pricing its ReaLemon product below its variable costs in any sales district. "Variable costs" are defined as all costs which Borden could have chosen not to incur during the relevant time period. The relevant time period will consist of all consecutive fiscal quarters in which Borden's prices failed to cover its total costs, and thus will vary with the duration of any challenged price reduction.

The Commission is not here deciding that the standard imposed by this order is necessarily the appropriate standard in all instances for finding a violation of the antitrust laws as an initial matter.[10] Nor are we deciding that this order is necessarily the exclusive model for the relief to be granted in future predatory

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[10] The order therefore should not be read as approving all future pricing activity by Borden which does not violate the order, or as attempting to immunize such pricing from any future antitrust challenge. The fact that certain conduct has not been prohibited by a particular Commission order does not mean that that conduct could not still violate the general prohibitions of the antitrust laws.

pricing cases. The proposed order reflects the particular circumstances of this case, including the fact of a Commission decision based on grounds which can no longer be defended, and the difficulty of re-opening this now stale record or re-litigating the case under a more appropriate standard of liability. The Commission believes that this order represents an appropriate settlement of the pending litigation.

BENJAMIN I. BERMAN,
Acting Secretary.

SEPARATE STATEMENT OF COMMISSIONER DAVID A. CLANTON

While I join in the Commission's decision today, I feel compelled to correct some misimpressions about that decision that could be created by the separate statements of my fellow Commissioners. Focusing on the fact that the proposed settlement only prohibits Borden from pricing below variable costs, Commissioner Bailey, for example, states that the Commission is now endorsing this standard as the appropriate one for judging antitrust liability as an initial matter.

Clearly, that is not what the Commission has decided. In fact, I share many of Commissioner Bailey's concerns about adopting such a standard as the sole test of antitrust liability,* as would (I believe) my fellow Commissioners in the majority. This is why the Commission did not make such a decision, and why the final paragraph of the Commission's Statement explicitly disclaims any such decision. Similarly, as that paragraph also makes abundantly clear, we are not deciding that the proposed settlement represents the appropriate remedial order to enter in every case where antitrust liability has already been found. While some in the private sector may wish to ignore those disclaimers, and persist

*See my concurring opinion in the original Borden decision, 92 F.T.C. at 813.

in the belief that the Commission nevertheless has made such a decision, I can at least point out that they do so at their own peril.

The reason the Commission is provisionally accepting the proposed settlement has to do with the alternatives available at this stage of the litigation. One option, asking that the case be remanded to the Commission, is impractical due to the staleness of the record and the difficulties and expense of a new trial. Another option, defending the Commission's original decision before the Supreme Court, would also require us to defend the Commission's original order. That order prohibited Borden from pricing "below cost" without even attempting to define which costs were included in the relevant standard—and, if that were not enough, added a similarly undefined prohibition against charging "unreasonably low prices."** The third option, of course, is to accept the proposed settlement.

Thus, the comments that will be most useful to the Commission will be those that compare the proposed order with the possible alternatives, and make a recommendation on that basis. To assist in those comments, I have attached the order currently pending in this case as an appendix to this statement.

CURRENT ORDER (92 F.T.C. AT 832-33)

It is ordered, that Borden, Inc., and its successors and assigns, officers, agents, representatives and employees, directly or indirectly, or through any corpora-

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**To avoid creating the same misimpression I objected to earlier, I should point out that Commissioners Pertschuk's and Bailey's preference for defending the original order does *not* mean that they endorse the terms of that order as the appropriate standard for determining antitrust liability as an initial matter, or even as the appropriate model for relief in future predation cases where liability is found. The same understanding should be brought to the Commission's acceptance of the terms of the proposed settlement.

tion, subsidiary, affiliate, division or other device, in connection with the production, marketing and sale of processed lemon juice in or affecting commerce, as "commerce" is defined in the Federal Trade Commision Act, shall forthwith cease and desist from:

(1) Granting price reductions, directly or indirectly, which result in different net prices among Borden's ReaLemon customers, whether or not such customers compete in the same geographic area, which differences in price are not attributable to differing costs of manufacture, sale or delivery, and the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice;

(2) Selling ReaLemon lemon juice below its cost or at reasonably low prices, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice;

(3) Granting promotional allowances or payments of any kind for customers' promotional services, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice.

It is further ordered, that Borden, Inc., shall within sixty (60) days from the date this order becomes final, and every year thereafter for a period of ten (10) years, submit a detailed written report of its actions, plans and progress in complying with the provisions of this order, and fulfilling its objectives.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK CONCERNING PROPOSED ORDER MODIFICATION IN BORDEN, INC.

Docket No. 8978

FEBRUARY 25, 1983.

A majority of the Commission has voted to take the extraordinary step of weakening an order on the Commission's own initiative, after the order has been upheld by the court of appeals. The agreement adopted by the majority is a retreat to an order standard that is extremely lenient in allowing future predation by a monopolist, unduly ambiguous, and at odds with sound reasoning in recent court opinions. Moreover in order to implement this agreement, the Commission in essence is asking the Supreme Court—highly improperly in my view—to take cases that have long passed from an agency's jurisdiction and return them so that a new administration can re-decide them to apply its prevailing philosophy retroactively as well as prospectively. I cannot support, for proponents of any view, this approach to the administration of justice.

The majority seeks to modify the current *Borden* order in four principal ways: (1) changing the prohibition on below cost pricing to prohibit only pricing below "variable costs"; (2) dropping any prohibition of discriminatory pricing by geographic area; (3) dropping the provision on anticompetitive promotional allowances; and (4) including a 7 year sunset provision. What's left of the Commission's order is a cryptic provision prohibiting pricing below "variable costs," plus a novel definition of variable costs as those costs which are "avoidable, consistent with prudent business practices." This rubric actually changes the conventional concept of variable costs altogether and opens the door for Borden to construe it as narrowly as possible.

Before I discuss the legal and economic shortcomings as well as the administrative problems in the order, it is worthwhile to describe the steps which led to this "settlement." The Commission's order in *Borden* was affirmed by the court of appeals in early 1982. Borden petitioned for certiorari to the Supreme Court in August 1982, and the Commission's response was due to the Court in 30 days. Rather than oppose the petition as would have been the normal case, the Justice Department, on the Commission's behalf, asked for a series of extensions to accommodate "Settlement" discussions. During this period of negotiations, the draft orders exchanged between our staff and Borden grew steadily weaker (weaker than Borden originally proposed in fact) until the final agreement was reached. We have received no staff analysis of or recommendations on the legal and economic issues in the case, though the Bureau of Competition has forwarded a narrowly focused analysis of compliance problems in interpreting and enforcing the agreement. During this period, the make-up of the Commission changed so as to produce majority support for this agreement. In short, this settlement was not the result of a compromise to avoid further litigation, producing a compromise applicable only to this case, but a decision to change the order on policy grounds.

The *Borden* case presents a good example of why there is a rule against predatory pricing. The record in the case showed Borden was a monopolist with a 90% market share. While one brand of reconstituted lemon juice is for all practical purposes, virtually identical with any other, the ReaLemon trademark, which Borden promoted heavily, constituted a long-standing barrier to entry. Borden's rivals and retailers alike recognized that as a result of this advantage, Borden was able to charge up to 30% more than equally efficient competitors and remain competitive. Borden

priced differently in different geographic areas. It charged monopoly prices in areas where it faced no real market challenge and used selective price cuts to discipline or threaten competition in areas where it did face a competitive threat. Borden's internal documents reflected an intention to price selectively so as to eliminate its major rival in many areas—Golden Crown. This combination of factors makes a particularly strong case for concluding that Borden had crossed over the line from healthy aggressive pricing to anticompetitive predation likely to maintain the concentrated lemon juice market as the province of an almost total monopolist.

In articulating the standard of liability, the Commission quite properly did not focus solely on a comparison of prices and costs but considered other factors, including Borden's monopolist position, the difficulty of entry caused by its brand name advantage, the pattern of geographic price discrimination, and Borden's predatory intent. The Commission also clearly found that Borden had sold below average total costs. (92 F.T.C. at 807) Although the Commission was not unanimous in stating a standard for liability, it was unanimous in concluding Borden had engaged in predatory pricing. I do not believe many courts would quarrel with the essential holding that pricing at or near average variable costs by a monopolist, in a market with significant barriers to entry, and coupled with geographic price discrimination and predatory intent constitutes a violation of both Section 2 of the Sherman Act and Section 5 of the FTC Act. As the majority points out, it is true that the Commission did not establish any single cost-based standard for predation. But doing so would have been exceedingly difficult given the lack of legal or economic consensus in this area; it also would have been unnecessary, given that the evidence showed Borden violated even a very conservative standard of predation.

I would not defend each and every sentence in the Commission's 1978 opinion. If it were to be written today, with the benefit of further thinking and caselaw on predation, I would advocate that some passages be written differently. (I would venture, however, that this is the case for almost all opinions and all Commissioners. The conventional route for refining past opinions is to restate the principles in the next one.) While I concede that the court of appeals opinion reviewing the case went too far in claiming that the Commission's standard was based on *competitors'* costs (674 F.2d at 515-516), the court clarified its holding in a subsequent opinion.[11]

The Commission's statement also criticizes the opinion in *Borden* by suggesting that the opinion condemned product differentiation through advertising as "something pernicious in and of itself." (Majority statement at 5) I do not think that is a fair statement of the Commision's position in *Borden*. Advertising was significant in *Borden* because it created a barrier to entry, a view that has been supported by the courts.[12] Any language in the opinion which may suggest otherwise is not my view or, to the best of my knowledge, the view of the Commisioners who joined the opinion. While the advertising may have had some positive effects as well, its antitrust significance here is that by serving to erect a barrier to market entry by firms producing an indistinguishable product by equally efficient methods, it fostered a situation in which unassisted market forces could not readily redress any attempts by Borden to

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[11] The Sixth Circuit characterized its Borden holding in Richter Concrete Corp. v. Hilltop Concrete Corp., 1982-83 Trade Cas. ¶ 65,003 (1982). "Borden was found to be predatorially pricing by setting its prices below average total cost." *Id.* at 70,591, n.6.

[12] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d. 263, 287 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

exploit its monopoly power. And, the record in this case is clear that Borden did engage, successfully, in such efforts.

There is not yet a consensus about the proper standard for predation, but one point is clear: The reasoned opinions point away from the narrow, virtually impossible to meet average variable cost standard initially proposed by Professors Areeda and Turner in 1975. As Professors Brodley and Hay have pointed out, this standard, while appearing to offer a simple formulation consistent with economically efficient resource allocation, has the distinct disadvantage (for small firms trying to break into a market) that "it holds dominant firm pricing per se legal."[13] Consequently, virtually every recent appellate decision has declined to adopt a strict average variable cost rule for all situations.[14] While the

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[13] J. Brodley and G. Hay, "Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards," 66 Cornell L. Rev. 738, 793 (1981). As Brodley and Hay point out, the Areeda-Turner rule led to several difficulties. First, cost determination proved to be exceedingly complex in adjudication. Second, some adjustments had to be made in using the average variable cost as a surrogate for marginal cost to remain consistent with the economic theory of the rule itself. Third, several writers have rejected the Areeda-Turner rule even on efficiency grounds. Finally, the rule made it extremely difficult for plaintiffs to prove a violation, *Id.* at 768. Professor Williamson has called the rule "a defendant's paradise." Predatory Pricing: A Strategic and Welfare Analysis," 87 Yale L.J. 284, 305 (1977). For an excellent review of trends in predation law, *see* J. Hurwitz and W. Kovacic, "Judicial Analysis of Predation: The Emerging Trends," 35 Vanderbilt L. Rev. 63 (January 1982).

[14] The Ninth Circuit has recently stated in some instances pricing above average total costs could be predatory. Transamerica Computer Co., Inc. v. I.B.M. Corp., [1983] TRADE REG. REP. (CCH) ¶ 65,218 (9th Cir.). In Northeastern Tel. Co. v. Am. Tel. & Tel. Co., 651 F. 2d 767, 788 (2d Cir. 1981), the Second Circuit said "the relationship between a firms prices and its marginal costs provides the best single determinant of

Areeda-Turner rule is overly lenient as a standard for predation, the agreement adopted by the majority of the Commision, though using some terminology borrowed from Areeda-Turner, sets out an even more permissive standard—one that would mean a violation in this or any other industry would rarely occur and even more rarely could be proven.

In understanding the Commission's standard, it is important to note that, though the term "variable costs" is used, the standard is far from the standard conception of the term. The revised order actually prohibits *total* variable costs from exceeding total revenues in a single quarter in a single sales district. This is a very different idea from prohibiting pricing of products below the *average* variable cost per unit (a surrogate for marginal cost), and it leads to easy avoidance of the standard.

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predatory pricing" but applied this presumption only to a "run of the mill case." The Fifth Circuit in International Air Ind., Inc. v. American Excelsior Co., 517 F.2d 714, 724 (1978), required a showing of below average variable cost pricing or pricing below the short-run profit maximizing price when barriers to entry make such predation worthwhile. The Seventh Circuit in Chillicothe Sand & Gravel v. Martin Marietta Corp., 615 F. 2d 427, 432 (1980), viewed average variable cost as a useful factor but expressly indicated willingness to "consider the presence of other factors." The Eighth Circuit in Superturf, Inc. V. Monsanto Co., 660 F. 2d 1275, 1281 (1981), expressly noted that a monopolist who prices above average variable cost "may still be held to have engaged in a predatory act." The Ninth Circuit in Cal. Computer Products v. Intern. Business Machines, 613 F.2d 727, 743 (1979), noted "that refinement of the marginal or average variable cost test will be necessary as future cases arise," and expressly declined to "foreclose the possibility that a monopolist who reduces prices to some point above marginal or average variable cost might still be held to have engaged in a predatory act because of other aspects of its conduct." The Tenth Circuit in Pac. Eng. & Prod. Co. of Nev. v. Kerr-McGee Corp., 551 F. 2d 790, 797, cert. denied, 434 U.S. 879 (1977), found average variable costs to be "extremely beneficial," but nevertheless refused to base its test for predation solely on cost, and indicated it would look to other factors as well.

For example, in a single sales district (there are 22 in the country) Borden could price very low in some cities, far below avarage variable costs, while compensating by selling at monopoly prices elsewhere in the district. Second, Borden could sell products from a very profitable area at selectively low prices into a district where a new entrant was trying to break in. The lower prices for these sales would reduce revenue for the district but not enough to violate the standard. In short, the idea seems to be that a potential predator must obey the law on *average*, rather than in particular situations. This novel approach is analogous to a speeder pleading with the highway patrolman that he has driven under 55 on average—an argument no doubt herefelt by the speeder but rarely recognized by the law.

The second difference between the Commission's "variable cost" idea and the conventional notion of variable costs is that, 'variable" in the agreement actually means "avoidable" by Borden and only then when avoiding expenses is consistent with "prudent business practice." What this will come to mean in real life is subject to much speculation, but one thing seems certain: much of Borden's advertising and labor expenses—costs Areeda and Turner have presumptively included in variable costs—will be excluded in Borden's own calculations on the grounds that it was "imprudent" to cancel them. Indeed, it would be hard for this Commission, or any other "outsider" to disagree with Borden's own experts and executives about what is prudent and avoidable for Borden.

I will not discuss in detail other substantive and administrative problems with the order, with one exception—the seven year sunset provision. The original *Borden* order, as is typically the case, was not limited in duration. Our rules provide that respondents may petition to modify orders based on changed conditions, but a ban on predatory practices or any other practice

found to violate Section 5 has traditionally been permanent. One irony of the sunset is that because of the leniency of the Commission's order—much more permissive than the current state of the law—Borden is "subjected" to a less stringent standard than binds other monopolists until the sunset provision expires. If the Commission tries to sue Borden on the basis of *another* standard (as the Commission's statement suggests in fn. 10) Borden will no doubt argue that it was conforming to the Commission's order, that the Commission never would incorporate in any order a conduct standard lower than the recognized threshold of legality, and any transgression of any more restrictive standard was done in good faith. Under these circumstances, I am surprised Borden did not hold out for a permanent order.

The Commission now asks the Supreme Court to grant an extension for public comment on this agreement. While I surely support the opportunity for the public to comment, I respectfully believe that the Court should deny the Commission's request. A majority of the Commission is willing to circumvent the lengthy litigation in this matter in order to substitute a legal and policy approach held by the current administration. While I respect the right of the majority to decide the next opinion and to submit its views on that opinion to a court of appeals, I sincerely hope that the Court will not countenance what is in effect a dismissal of this matter by granting the Commission's request. Regardless of the legal merits, I consider it unseemly for this Commission to ask the Supreme Court to help it dismiss a case and vacate existing opinions in the matter five years after the case has left the Commission's jurisdiction, simply to accommodate the views of the administration in power. If accepted, this request threatens to set an unwise precedent for all agencies which, having undergone a change of philosophy and administra-

tion want to undo the efforts of past administrations in matters that, without the Supreme Court's aid, are no longer within its grasp.

The majority is doing much more by accepting this agreement than quibbling about language in the Commission's or Court of Appeals' opinions. It is trying to point predation law in a different direction—toward a solely cost-based standard that will be infrequently violated in real life and even less frequently proved. While it may appeal to some as embodying the height of economic rationality, as a practical matter, the standard in this order would take the Commission out of the business of policing predation.

DISSENTING STATEMENT OF COMMISSIONER PATRICIA P. BAILEY ON PROPOSED ORDER IN BORDEN INC., DOCKET 8978

I cannot agree with many of the policy pronouncements in the majority's statement, and I have only slight hope that the public comment period will resolve my concerns about the wisdom and efficacy of this consent.

Were I deciding *Borden* today, I might well write a different opinion from the one of four years ago (in which I was not a participant), because of both my own views and the evolving state of the law. However, the 1978 opinion is by no means susceptible of the majority's criticism that it embraces a "standard of conduct [which is] inconsistent with the purposes of Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act." (Majority Statement, p. 3). On the contrary, *Borden*, whatever its arguable deficiencies, is within the mainstream of judicial and academic opinion which looks at a variety of factors, in addition to "below cost" pricing, to evaluate predatory intent and dangerous probability of success.

The evil of *Borden*, it seems, is that the case "does not set forth a satisfactory cost-based standard for predation." (*Id.*) Judging from this language and the proposed consent, the majority feels that a variable cost standard, and only a variable cost standard, should determine liability on a predation theory. This flies in the face of every[15] recent circuit court decision on predatory pricing and the Commission's own recent examination of dominant firm behavior.

Since 1975 there has been "a virtual explosion in the legal and economic literature dealing with predatory pricing." J. Brodley & G. Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 Cornell L. Rev. 738, 740 (1981). At least nine different economic theories for detecting predation have been advanced,[16] and the courts have been

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[15] The majority opinion in MCI Communications Corp. v. American Tel. & Tel. Co., 1982-83 Trade Cas. ¶ 65,137 (7th Cir. 1983) comes close to placing definitive reliance on a cost standard; however the standard referred to, long-run incremental cost, is considerably more inclusive than a variable cost standard, and particularly the variable cost standard proposed by the majority of this Commission.

[16] The seminal discussion recommended a short-run marginal cost pricing rule using average variable cost as a practical surrogate for marginal cost. P. Areeda & D. Turner, Predatory Pricing and Related Practices of Section 2 Under the Sherman Act, 88 Harv. L. Rev. 697 (1975). This proposal was challenged for disregarding the risk that a dominant firm can successfully pursue a strategy of sacrificing short-term profit for long-term benefits in order to exclude actual or threatened competition. F. Scherer, Predatory Pricing and the Sherman Act: A Comment, 89 Harv. L. Rev. 869 (1976) (offering an economic model for testing cost based rules and suggesting a broad rule-of reason approach). Other commentators proposed long-run pricing rules that emphasized different cost factors. R. Posner, Antitrust Law: An Economic Perspective, 184-196 (1976) (presumptively condemning sales below average total cost with intent to exclude a competitor); P. Joskow & A. Klevorick, A Framework for Analyzing Predatory Pricing Policy. 89 Yale L.J. 213 (1979)

both selective and idiomatic in applying these tests.[17] However, the circuits are united in refusal to find that prices above average variable cost but below average total cost are conclusively lawful regardless of market conditions.[18] Rather, each case has indicated that pricing above average variable cost but below average total

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(proposing a two-tier test: only if monopolistic conditions exist in the market may pricing below the average variable cost be conclusively illegal, or pricing below average total cost be presumptively illegal under specified conditions). Other economists recommend approaches focusing on output changes or the timing of price cuts. O. Williamson, Predatory Pricing, a Strategic and Welfare Analysis, 87 Yale L.J. 284 (1977) (barring dominant firms from expanding output or selling below full cost to forestall entry): W. Baumol, Quasi-Permanence of Price Reductions: A Policy of Prevention of Predatory Pricing, 89 Yale L.J. 1 (1979) (barring price increases by a dominant firm for a specified period after its price cuts drive competitors from the market). Although not proposing a specific legal standard, two commentators have drawn attention to the prerequisites for successful entry-deterrance conduct. Salop, Strategic Entry Deterrance, 69 Am. Econ. Rev. 335 (1979); Spence, Entry, Capacity, Investment and Oligopolistic Pricing, 8 Bell J. Econ. 534 (1977). And finally, in fairness, I should note that at least one commentator has argued that there should be no standard at all, since no problem exists. R. Bork, The Antitrust Paradox 154 (1978).

[17] J. Hurwitz & W. Kovacic, Judicial Analysis of Predation: the Emerging Trends, 35 Vanderbilt L. Rev. 63 (1982).

[18] Most circuit courts have indicated that pri[illegible] above average total cost are presumptively, if not *per se*, legal. *See, e.g.*, Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427 (7th Cir. 1980); International Air Indus., Inc., v. American Excelsior Co., 517 F.2d 714, 723 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). *But see* Transamerica Computer Co., Inc. v. I.B.M. Corp., 1983-Trade Reg. Rep. (CCH) ¶ 65,218 (9th Cir.), holding that prices above average total cost are not presumptively legal. The circuits treat prices below average variable cost as presumptively illegal. *See, e.g.*, William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 652 F.2d 917, 939-940 (9th Cir. 1981), *cert. denied*, 81-2083, Oct. 4, 1982.

cost may be unlawful if other factors demonstrate predatory intent and injury to competition. Among the factors which have been mentioned are (1) market conditions which would thwart or aid monpolization, notably the height of entry barriers: *William Inglis & Sons* v. *ITT Continental Baking Co.*, *supra* at 933; *Northeastern Tel. Co.* v. *AT&T Co.*, 651 F.2d 76, 88-89 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1438 (1982); *International Air Industries, Inc.*, *supra*, 517 F.2d at 724; (2) independent proof of predatory intent: *SuperTurf Inc.* v. *Monsanto Co.*, 660 F.2d 1275 (8th Cir. 1981); *O. Hommel Co.* v. *Ferro Corp.*, 659 F.2d 340, 348-50 (3rd Cir. 1981), *cert. denied*, 102 S.Ct. 1711 (1982); *William Inglis & Sons Baking Co.*, *supra* at 942-43; *Chillocothe Sand & Gravel Co.*, *supra* at 433; (3) overall market capacity; *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 796-97 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 461 F. Supp. 410, 418-419 (N.D. Cal. 1978), *aff'd in part and rev'd in part*, 652 F.2d 917 (9th Cir. 1981). In addition, it is of course an antitrust truism that a firm with monopoly power may not be permitted the same latitude of conduct as its smaller rival. *U.S.* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass 1953). Courts have consistently acknowledged the need to protect equally efficient competitors from abuses of monopoly power.

The *Borden* opinion, as I read it, states that the record contains proof of (1) monopoly power; (2) anticompetitive intent, manifest in Borden documents which identify the threat Golden Crown posed to ReaLemon and present a calculated strategy for blocking Golden Crown at key entry points in order eventually to regain

the pricing discretion of the pre-entry period;[19] (3) other conduct, which was arguably anticompetitive in the overall context, such as geographic price discrimination, local market saturation promotions, and high-impact regional advertising; (4) high barriers to entry to the form of ReaLemon's extraordinary brand image; (5) findings that Golden Crown lemon juice essentially matched ReaLemon in quality (thus indicating that the ReaLemon consumer franchise probably did not reflect current product superiority); and (6) findings that Golden Crown was as efficient as ReaLemon. With so many 'plus factors', particularly the evidence of noncompetitive market structure with vulnerable local competitors and direct evidence of predatory intent, surely the strictest possible cost standard is not required. The Commission did not, after all, find that Borden engaged in ephemeral price reductions, only slightly below its average total cost. Rather it found that Borden priced so far below ATC, for significant stretches of time, that it approached its average variable cost line—and across it if advertising expenses are counted as variable costs.[20] (see summary in Commissioner Pitofsky's concurring opinion, 92 FTC at 830-831).

The rule of reason approach in Borden—careful scrutiny of market structure, defendant's pricing levels and other conduct, available proof of intent and actual com-

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[19] In other words, Borden's price reductions were not simply a response to lower priced competition. They reflected an internal strategy to give up short-term profits in order to eliminate competition and recoup thereafter—the textbook definition in predation. P. Areeda and D. Turner, *supra*, at 693.

[20] The proposed order allows Borden to claim many advertising costs as fixed. I disagree with this provision. I see no unique circumstances in this case or industry which would warrant deviation from the normal practice, endorsed by Areeda and Turner, of presuming that advertising costs are variable. P. Areeda & Turner, III Antitrust Law, 173 (1978).

petitive consequences—is the approach I would bring to allegations of predation, and the one which I thought the Commission had reaffirmed in *E.I. DuPont de Nemours & Co.*, 96 F.T.C. 653, 745-46 (1980). I see no need to truncate predation analysis by attaching conclusive presumptions to comparisons of prices and costs. As Judge Wood has recently pointed out, economic and accounting evidence can be just as inexact and ambiguous as evidence of intent gleaned from documents and conduct. *MCI Communications Corp.* v. *American Tel. and Tel. Co.*, 1982-83 Trade Cas ¶ 65,137 (7th Cir., 1983) (dissent). The two weak components need each other.

I am also troubled by implications in the majority statement that geographic price discrimination is inherently procompetitive. This seems to me contrary to the letter and policy of the Robinson-Patman Act, which we should strive to reconcile with the other antitrust laws. While geographically selective price reductions can be a legitimate response to competition,[21] they can also be a highly effective monopolization strategy, as the Supreme Court has long recognized: If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 119 (1955).

See also U.S. v. *Grinnel Corp.*, 284 U.S. 563, 570, 576 (1966). Many of the current commentators on the predation issue have focussed on the effectiveness of a

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[21] See discussion by Commissioner Pitofsky in his concurring opinion in *Borden*, 92 FTC at 820-822.

multimarket strategy. *See, generally,* Salop, ed. *Strategy, Predation and Antitrust Analysis,* (1981); R. Posner, *Antitrust Law: An Economic Perspective,* 62-65, 176-80 (1976). Accordingly, I would not automatically approve geographic price discrimination, but would carefully examine it in light of other conduct to determine if other indicia of an attempt to lessen competition or monopolize are present.

If the majority are incorrect for their exclusive reliance on a cost standard as the determinant of liability, they are doubly incorrect in their choice of cost standard on which they rely. Even courts which have placed the most reliance on a cost-based standard for predation have looked to *average* variable costs. This order looks only to total variable costs, assessed, moreover, in multi-state markets. These markets are defined, not by competitive realities, but by the boundaries of Borden's sales districts. Currently there are 22, but the order permits Borden to increase or decrease this number at will. As long as total revenues exceed total variable costs, Borden is absolved of wrongdoing. Many, if not most, predation cases have alleged a smallish target market—a city or county area.[22] Yet Borden is now free to confront rivals in such areas with an absolute giveaway program, so long as sales in the remaining parts of the sales district bring total revenues above total variable costs. I would like to hear from some producers of reconstituted lemon juice about the vulnerability to a less-than-sales-district size price war.

Compounding this problem, the order appears to allow Borden to play a shell game when allocating costs to individual sales districts and time periods. Allocations can be made without prior FTC approval, and without any limitation as to frequency. The order says

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[22] Indeed, Borden's "Golden Crown Strategy" was aimed at specific metropolitan areas and geographic regions. 92 FTC at 727-728, 732-756.

costs may be allocated according to "identifiable factors that make allocations to a particular sales district proper", but gives virtually no guidance[23] on the precise method of allocation. I would welcome comments for corporate accountants on the feasibility of using such flexibility to hide predatory pricing.

Finally, the order is defective in a practical sense: it appears that compliance monitoring and enforcements will require *de novo* investigations and trial. The essential problem is that the order does not define "variable cost" with any specificity. A cost will qualify as variable if it is "avoidable" consistent with "prudent business practice." I fear that in assessing avoidability, our staff would have to look at market definition and market power in order to know if Borden's actions were prudent under the circumstances. Moreover, on costs which traditionally are seen as variable (such as advertising or labor) it would seem that the burden of proof has shifted; on Borden's mere say-so, our staff now must show that each element of each category of cost was not avoidable, rather than Borden's showing why the characterization does not apply. Since Borden has the most control over the evidence on point, it will be an uphill struggle for our compliance staff.

To the extent that Borden can argue that certain costs, although traditionally considered marginal, nonetheless cannot be avoided consistent with prudent business practices, the standard by which Borden will be judged could be less than actual marginal cost. It is ironic that Areeda and Turner instituted the search for a cost threshold from a desire to find an objective and workable standard for distinguishing between pricing above or below marginal cost, which they concluded is "the economically sound division between acceptable,

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[23] The exception is contained in provision A2, regarding certain costs of television advertising.

competitive behavior and 'below-cost' predation". P. Areeda and D. Turner, *supra* at 716. Today the Commission abandons the quest for objectivity and manageability and endorses a test which rests so much as Borden's subjective conclusions that even the relationship to marginal cost is attenuated.

Lastly, I am not as sanguine as the majority about the chances of this consent being declared devoid of precedential significance. Most consents are indeed *sui generis;* but this one, accompanied by a lengthy statement full of sweeping statements on the "correct" application of predation theory, seems destined to play a continuing jurisprudential role. We may be able to erase it from our institutional memory (although I doubt that companies seeking equity and parity will allow us to do so uncontested), but we can hardly dictate its use in private actions.

One further aspect of this matter concerns me apart from the actual merits of the settlement or the majority's theories on predatory pricing. What we have here is not a standard settlement. What we have here is a proposal, couched in terms of a settlement, to repudiate the Court of Appeal's decision affirming the 1978-Commission's final decision in order to allow the 1983-Commission to redecide the case. The Supreme Court is being asked to facilitate this change in the Commission's decision, not by rendering a decision on the merits, but by performing the purely administrative function of returning the matter to the agency's jurisdiction so that the agency can change its mind. Such an effort seriously distorts the proper relationship of a federal agency to the judiciary, and sets a highly visible precedent for any agency, any time it undergoes a change in administration or guiding principles, to petition the courts to reach backward in time to rewrite opinions long completed and to nullify independent judicial efforts long since expended.

The reality of the Commission's position is not that, since 1978, the law of predatory pricing has become clear; it has not. In any event the terms of the settlement do not conform to any previously expressed standards of law in the area. Rather, the composition of a federal agency has changed, and it now believes its view of predatory pricing is "better" than the one applied earlier.[24] Whether or not this is true, the Commission ought to be content to use its newer view of the law to guide its decision on current matters. By such a process, comment on older cases may be offered, new precedent issued, and the course of the law possibly shifted. To go beyond the bounds of this traditional power, however, is to disrupt the orderly process of jurisprudence—an expansionist view of this agency's role to which I do not subscribe. It is noteworthy, moreover, that this "better" view of the law had not surfaced at the Federal Trade Commission even as recently as February 1982, when, after briefing and argument by Commission attorneys, the Court of Appeals issued its affirmance of the 1978 FTC Opinion. Indeed, the Commission did not see fit to "educate" the Sixth Circuit about these new views even after it received the Court's "favorable" decision, and when that Court still could have modified its opinion or reheard the case *en banc*. Because the only purpose of the extension now requested is to permit the Commission to subsequently ask this Court to help it implement its agreement with Borden, I would urge that the request be denied.

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[24] If it were at all clear (1) that the Commission applied the wrong legal standard to this case in 1978, or (2) that the Court of Appeals in 1982 repeated or added to the alleged error in its affirmance of the Commission, (3) or that a "correct" standard applicable to predatory pricing had emerged judicially, or (4) that the Commission intended to apply any such judicially endorsed standard—I might be more sympathetic to the majority's position.

SEPARATE STATEMENT OF COMMISSIONER GEORGE W. DOUGLAS IN THE MATTER OF BORDEN, INC., DOCKET NO. 8978

I wholeheartedly concur with the majority statement in support of the revised order for the simple reason that it seeks to correct what has proven to be an egregiously bad order founded on a tortured economic treatment of advertising as an entry barrier, an erroneous concept of geographic price discrimination, and an undefined cost-based standard for predation. Indeed, of all the issues explored in the minority comments and in the majority's statement, the one point that stands clear is that none of the five Commissioners is satisfied with the original decision and order in the case.

First, in the Commission's original, 1978 order, Borden was prohibited from pricing its ReaLemon brand of reconstituted lemon juice "below its costs" or at "unreasonably low prices" (92 FTC 669 at 833). The language used was so vague and undefined ("costs" were not defined at all) that upon appeal the Sixth Circuit Court was able to read into the order a prohibition against Borden from pricing its product at any level that would cause its competitors to price below *their* average variable costs (674 F.2d 498, at 515-516).

Clearly, forcing Borden to erect a price umbrella over its competitors' heads in effect turns the economic theory of competitive markets on its head, to the extent that under the guise of promoting competition, the Commission would require market leaders to maintain prices above competitive levels so as to enable other firms successfully to market products perceived by consumers as interior.

Second, I am not at all persuaded by Commisioner Bailey's and Pertschuk's concerns that the cost standard referenced in the modified order is either vague or unenforceable; rather, in comparison with the original

order, it is a model of clarity, setting forth with as much direction as possible a cost based standard that comports with traditional economic concepts.

Third, I dispute Commissioner Pertschuk's claim that the revised order is "at odds with sound reasoning in recent court opinions." To the contrary, the revised order is well-attuned to the prevailing tendency of courts to employ more clearly delineated cost-based tests—especially variable cost standards—in evaluating pricing conduct. Indeed, to cling to the language and reasoning of the Commision's original order would confound sound economic principles, and would ignore the basic direction of judicial analysis over the past eight years. In my judgment the Federal Trade Commission should enforce the antitrust laws with the *best* economic evidence and insight available, whether found in court opinions or elsewhere. In this instance the Commission modifies an order which has become, through its own mistaken rationale, through its vagueness, and through its interpretation by the Sixth Circuit, paradoxically anticompetitive in itself.

[FR Doc. 83-5466 Filed 3-1-83; 10:21 am]

APPENDIX B

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK CONCERNING BORDEN, INC., DOCKET NO. 8978

APRIL 27, 1983

For the reasons I stated in my dissent of February 25, 1983, I continue to believe that this order should not be accepted and the Commission should seek denial of the petition for *certiorari*. The comments received support the proposition that the standards in the settlement are virtually unenforceable and that it represents a retreat from the current evolution in the law of predation.

I also dissent from the Commission's request that the Court vacate the judgment of the court of appeals. As the Solicitor General has previously argued, vacating the judgment of the court of appeals because of mootness, in a case where the Court would not otherwise have granted *certiorari*, is inappropriate.[1] The court of appeals has held that a lower court judgment should not be vacated, even where the case has become moot after judgment, if the mootness is the result of the appellant's voluntary actions.[2]

The Borden case was initiated by an administrative complaint in 1974. It was prosecuted by successive Commissions under the leadership of four Chairmen over three administrations, through the court of appeals' affirming of the Commission's opinion and order in 1982. It is now being undermined by the current administration, which is clearly hostile to predatory

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[1] See Brief for the United States, Velsicol Chemical Corp. v. U.S. (U.S. No. 77-900), March 1978 at 4-8, *cert. denied*, 435 U.S. 1070 (1979); *see also* International Ladies' Garment Workers' Union v. U.S., 439 U.S. 1070 (1979).

[2] Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, 686 F.2d 720 (9th Cir. 1982).

pricing cases. Such reversals of lengthy litigation raise serious questions about the integrity and finality of adjudication.